Woodview Rehabilitation Center *and* 1199 Indiana of the National Union of Hospital and Health Care Employees, a Division of Retail, Wholesale and Department Store Union, AFL–CIO. Cases 25–CA–13618 and 25–CA–13826

December 13, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On March 24, 1982, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions and supporting briefs. In addition Respondent filed a motion to strike the General Counsel's exceptions, a reply to the General Counsel's exceptions, and an affidavit in support of its position. Thereafter, the General Counsel filed a motion to strike Respondent's affidavit.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and other submitted material and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Woodview Rehabilitation Center, Michigan City, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Threatening employees with loss of the statutory right to present grievances to their employer and threatening the loss of various benefits, including favorable health insurance rates and working hours and prompt salary increases, because they are members of, or aid and assist or sympathize with 1199 Indiana of the National Union of Hospital and Health Care Employees, a Division of Retail, Wholesale and Department Store Union, AFL–CIO, a labor organization herein called the Union, or of any other labor organization."

2. Add the following as paragraph 1(b) and reletter the subsequent paragraphs accordingly:

"(b) Threatening employees that selection of the Union as their representative would be futile."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten employees with loss of any statutory rights or benefits because they are members of, or aid and assist, or sympathize with, 1199 Indiana of the National Union of Hospital and Health Care Employees, a Division of Retail, Wholesale and Department Store Union, AFL–CIO, a labor organization,

[1] In adopting the Administrative Law Judge's conclusion that Respondent's administrator, Estes, engaged in unlawful surveillance of Osborne, we find it unnecessary to rely on his finding that Estes normally spent only 10 to 15 minutes at Respondent's facility on weekends.

In addition, we hereby correct the Administrative Law Judge's finding that the May 25, 1981, meeting between Estes and Respondent's employees lasted 1-1/2 hours. The record indicates that this meeting actually lasted between 30–45 minutes. However, the length of this meeting has no bearing on the Administrative Law Judge's ultimate finding that Estes made unlawful threats during the course of his speech to the employees, which finding we adopt herein.

Both Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge failed to consider whether Respondent's conduct with regard to employee Kenneth Osborne violated Sec. 8(a)(4) and (1) of the Act, as alleged in the complaint. Upon our review of the entire record in this case, we find that no violation of Sec. 8(a)(4) and (1) has been established and we hereby dismiss this allegation.

In adopting the Administrative Law Judge's conclusions we note that the General Counsel filed no exceptions to his determination that Respondent's "no access" and "no trespass" rules were not unlawful on their face.

Contrary to his colleagues, Member Hunter does not agree that Respondent's statements, indicating that if employees selected the Union as their representative they could no longer approach Respondent directly to work out problems but would have to go through the Union, were violative of the Act. Member Hunter believes such statements are protected by Sec. 8(c) of the Act. In addition, Member Hunter does not rely on *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), or any findings made by the Administrative Law Judge based on *T.R.W.*, in reaching his decision in this case. See *Intermedics, Inc. and Surgitronics Corporation, a Wholly Owned Subsidiary of Intermedics, Inc.*, 262 NLRB 1407 (1982) (Chairman Van de Water and Member Hunter dissenting).

[3] While the Administrative Law Judge found that Respondent violated Sec. 8(a)(1) of the Act by threatening employees that selection of the Union would be futile and that they would lose their right to present grievances directly to its administrator, he inadvertently failed to provide a remedy for these violations. We hereby conform the recommended Order to his findings. In addition we hereby deny both Respondent's motion to strike the General Counsel's exceptions and the General Counsel's motion to strike.

herein called the Union, or any other labor organization.

WE WILL NOT threaten employees that selection of the Union as their representative would be futile.

WE WILL NOT (1) promulgate, maintain, or enforce any rule, including a rule limiting off-duty employees access to our work premises, prohibiting employees from soliciting or distributing union membership application cards or any other union literature, or the literature of any other labor organization, where such promulgation was caused by our employees engaging in activities on behalf of the Union, or any other labor organization; or (2) promulgate, maintain, or enforce such a rule, regardless of motive, which prohibits the distribution by our employees of membership application cards or other union literature of any labor organization on working time in any facility work area without telling our employees when they may engage in such and similar protected concerted activities on our premises.

WE WILL NOT keep the activities of our employees under surveillance where the object is to interfere with their lawful union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WOODVIEW REHABILITATION CENTER

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Upon a charge in Case 25-CA-13618 filed by 1199 Indiana of the National Union of Hospital and Health Care Employees, A Division of Retail, Wholesale and Department Store Union, AFL-CIO, herein called the Union or Charging Party, on June 12, 1981, and served on Woodview Rehabilitation Center, the Respondent, on June 15, 1981, the Regional Director for Region 25 of the National Labor Relations Board issued a complaint and notice of hearing dated July 24, 1981, and Respondent filed a timely answer. Upon a further charge in Case 25-CA-13826, filed and served by the Union on August 13, 1981, the Regional Director issued an order consolidating cases and a complaint and notice of hearing on September 17, 1981, to which Respondent filed a further timely answer. The two complaints allege various independent violations of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, and a violation of Section 8(a)(3) and (1) of the Act with regard to discrimination against its employee, Kenneth Osborne.

On January 4-6, 1982, in Michigan City, Indiana, pursuant to prior notice, a consolidated hearing was held on the issues raised by the complaints and answers. Respondent and the General Counsel were represented by counsel, were given full opportunity to call and examine witnesses, introduce testimony and other evidence, and argue orally on the record. At the conclusion of receipt of testimony, all parties waived final argument and thereafter, Respondent and the General Counsel filed timely briefs which were carefully considered.

Upon the record as a whole, including the briefs and my observation of the demeanor of the witnesses as they testified, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Although the complaints allege Respondent to be a corporation, at the hearing, Respondent admitted that at all material times it has been, and is, a partnership duly organized under and existing by virtue of the laws of the State of Indiana,[1] and has maintained its principal office and place of business in Michigan City, Indiana, where it owns and operates a facility providing health care, rehabilitation and treatment of patients. During the 12-month period ending June 12, 1981, a representative period, Respondent, in the course and conduct of its business operations with regard to the above facility, derived gross revenues in excess of $250,000 and received at said facility, products, goods, and materials valued in excess of $5,000 directly from points outside the State of Indiana. Further, Respondent admits that at all material times it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I so find.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaints allege, Respondent at the hearing admits, and I find that at all material times the above-captioned Charging Party has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

Woodview Rehabilitation Center in Michigan City, Indiana, is a nursing facility consisting of a center wing, where the administrative offices are located, and a north and south wing. It employs approximately 180 employees on three shifts and cares for 190 to 194 geriatric and disabled patients. The Respondent admits that as alleged in the complaints Frank Estes, administrator, Cheri Enright, director of nursing, and Donna Vedo, charge nurse, are supervisors within the meaning of Section 2(11), and agents of Respondent within the meaning of Section 2(13) of the Act. It is undenied that patients in the north wing (where there are 24 patients in 12 to 14 rooms) require the most skilled care rendered by Respondent and the majority need 100 percent attention for their daily needs. They are the most dependent patients in the estab-

[1] The partners are Milton Baskoff, Amos Arney, Leonard Paul, and Myron Berkson.

lishment. The alleged unfair labor practices concern activities in the north wing.

In order to operate a day-time shift in the north wing, Respondent requires a panel of 15 full-time employees, or the *equivalent* of 15 full-time employees, made up of part-time employees and full-time employees, so that, at any one time, 10 employees would be available for the day shift, 7 days per week. The panel of 15 employees permits a 6-week cycle of scheduling 10 employees on the day shift working 4 days, off 2 days, and working the next 4 days.

The employees involved in the alleged unfair labor practices are all female nurses aides except Kenneth Osborne, the sole male nurses aide in the north wing. Nurses aides provide direct patient care. They bathe, feed, clothe, clean, and transfer patients to and from their rooms and toilet areas and otherwise physically lift and move the patients from beds to chairs. Aside from feeding the patients and making sure that they have plenty of liquids, the nurses aides regularly check the physical comfort of the patients and, *inter alia*, see to it that their urinary tract (Foley) catheters are properly installed and in service. In caring for these geratric and disabled patients, two nurses aides are often required for the physical transfer and activities of the patients.

When the nurses aides and other Respondent employees are off duty, they sometime gather in a "breakroom" which is also used as a lunchroom.

B. *Union Activities Among Respondent's Employees*

Union activities among Respondent's employees originated with Kenneth Osborne, the alleged discriminatee herein, in or about March 1981, at which time he found the nurses aides unhappy with their working conditions and first approached an organizer for the Charging Party, then organizing employees at a nearby hospital. In April 1981, Osborne talked to the nurses aides about the advantages of joining a union; by on or about May 15, he signed a membership application card in the Union; and, notifying coemployees, he scheduled a union meeting at a nearby shopping center for May 25, 1981. Every day at work, Osborne carried union leaflets and application cards and distributed these materials to employees and attempted to answer their questions.

Frank Estes, Respondent's administrator, and its chief executive officer, testified that he first learned of union activities among his employees on Monday, May 25, 1981, the Memorial Day holiday. During their lunch time, he walked into the employee break area where six or seven employees were speaking with Kenneth Osborne. Osborne had been speaking of the Union for 15 minutes, telling them of the approaching union meeting, and had union leaflets on the table when Estes walked in. Estes heard the employees talking about the Union and said to Osborne: "I thought you'd be the last one to do something like this." There is no further or other evidence relating to the circumstances of Estes' presence in the lunchroom, especially whether his presence there was unique.

The July 24 complaint alleges (pars. 5(b)(iii)) that Respondent, by Frank Estes, on May 25, 1981, in the lunchroom, kept the union activities of its employees under surveillance. Such an otherwise apparently abrupt appearance in the lunchroom and Estes' statement of surprise, dismay, and disappointment, at Osborne's engaging in union activities with the employees, whatever else they might entail, do not constitute surveillance within the meaning of Section 8(a)(1) of the Act. On the contrary, such evidence fails to demonstrate Estes' purposeful presence for an unlawful end. There being no further evidence of surveillance on that date in that facility, I recommend to the Board that such allegation be dismissed as unproven.

On the other hand, the statement, particularizing one of several employees, demonstrating dissatisfaction by the highest supervisor, does have a restraining effect on Osborne pursuing a protected right. Estes' statement was not a statement of disappointment addressed to all employees and the effect must be measured by his focus on one employee and its effect on others. I conclude it constituted an unlawful restraint within the meaning of Section 8(a)(1).

Later on, on the same day, moreover, Estes admitted that he told Osborne in the north wing area: "You know I did not have to give you days off or insurance benefits." Osborne answered that he knew that Estes did not have to give him this and Estes added: "I just wanted to let you know I didn't have to give them to you." Osborne credibly testified that this statement was made in the presence of Ward Clerk Barbara Niendorf. It is undenied, however, that 2 days later, Estes returned and told Osborne that he did not have to worry about the insurance and his hours of work. Osborne was not called in rebuttal to deny this further Estes statement.

The complaint alleges (par. 5(b)(iv)) that on May 25, 1981, Estes threatened employees that their benefits and working hours would be changed if the employees supported the Union. As above noted, Estes learned of Osborne's union activities earlier in the day. I conclude that, by these two later exchanges on May 25, Respondent, as alleged, was directing these statements at Osbornes union activities thereby violating Section 8(a)(1) of the Act, by Estes, in the use of his discretion, threatening to eliminate Osborne's beneficial working conditions, especially health insurance and convenient working hours, because of his union activities.[2] Estes' attempted retraction of his May 25 threat a couple of days later was inadequate since, *inter alia*, there was no adequate notification, at least on this record, to Ward Clerk Barbara Neindorf who was present at the original threat, which would withdraw or remove the coerciveness of the threat with regard to *her*. Thus, aside from Respondent's subsequent violations of Section 8(a)(1) of the Act, as noted hereafter, which undermine the legal effect of Estes' apology, *Austin Powder Company*, 141 NLRB 183,

[2] Up through at least May 23, 1981, Osborne, a part-time employee, was given special working hours geared to his day-time attendance at a local college. His regular work schedule, although it was changed from time to time, for a long period, was usually 8 hours per day on Monday, Wednesday, Saturday, and Sunday. In addition, although part-time employees, unlike full-time employees, paid for their health insurance benefits out of their own pockets, the charge for this insurance was reduced for part-time employees, including Osborne, when paid through Respondent, apparently as part of a group. This was admitted by Estes.

192 (1979), Respondent's attempted retraction failed because of its inadequate scope measured by the number of employees coerced by the original unlawful threats. *Passavant Memorial Area Hospital* 237 NLRB 138 (1978); *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). Moreover, there was no assurance given by Estes or anyone else that in the future Respondent would not further interfere in employees' exercise of Section 7 rights. *Passavant Memorial Hospital, supra* at 139, and cases cited therein.

In paragraph 5(b)(V), the complaint further alleges that on May 27, 1981, at the north wing nursing station, Estes threatened employees that they would be discharged if they talked about the Union or passed out union literature. There was no proof supporting such allegation and I recommend to the Board that it be dismissed as unproven.

Paragraph 5 (the consolidated complaint dated September 17, 1981) alleges that in mid-June, Estes threatened employees with more onerous working conditions because they joined and assisted the Union, and paragraph 5(b)(iv) of the earlier (July 24, 1981) complaint alleges a similar May 25 threat covering benefits and workhours. The evidence shows that sometime shortly after Estes' above identification of Osborne as engaging in union activities and his resulting statement of disappointment and unhappiness, Respondent called a meeting of employees in May 1981, in the conference room. The meeting lasted about 1-1/2 hours and was attended by at least six employees along with Director of Nursing Enright and Administrator Estes. The testimony regarding the events at this meeting was provided by a witness originally called by Respondent but who was thereafter called as the General Counsel's witness (Sandi Harper). She, Osborne, and perhaps five other nurses aides, had been distributors of union membership application cards and union literature to coemployees starting in late May 1981. In any event, at this conference room meeting in May 1981, Estes gave the "pro's and con's" regarding employees selecting the Union. According to Harper, Estes said that there would be a cut in "benefits" (without naming what benefits) and the employees would lose more than they would gain if they brought the Union in. He told them that they would not get raises when the Union said that they would get them and it would be up to Estes to say when the raises would occur. He also told them that, if they wanted more manpower, the Union could not get it for them and that thereafter, if they wanted to work out any of their problems, they could not approach him; they would have to go to their union representative.

Estes gave a different version of his address to this meeting of employees. He said that he told the nurses aides the pros and cons of unionization but denied that he said that there would be any cut in benefits; rather, it would really be a matter of negotiation if the Union got in whether there would be additional pay benefits. He said that he pointed out that in the nearby Methodist Hospital, where the Union got in, the Union accepted an insurance plan inferior to the one that had originally been in effect. He denied saying that the employees would lose anything if the Union got in and also denied saying that Respondent would not give raises when the Union said no. He said that he was willing to negotiate with the Union and that it was basically up to the employees to demonstrate whether they wanted the union or not: by signing cards if they wanted the Union and not signing if they did not.

Since Harper was a witness called by Respondent and, as noted below, gave clearly favorable and sometimes exaggerated testimony in behalf of Respondent, I credit Harper's version of Estes' speech rather than Estes' contrary version.[3] Thus I conclude that, as alleged, in this post-May 25 speech, Respondent threatened employees that they would lose benefits, would no longer be able to resolve their grievances by going to him if they selected a union to represent them and also threatened that the selection of a union would be futile (since he, not a union, would decide on manpower requirements and the timing of pay raises) all in violation of Section 8(a)(1) of the Act.

Further, the complaint alleges that on or about May 11, 1981, Respondent's supervisor, Donna Vedo, threatened employees with unspecified reprisals if they talked about the Union or handed out union literature. There being no evidence in this record regarding any unlawful act of Supervisor Vedo, I shall recommend to the Board that it dismiss this allegation of the complaint as unproved.

In further support of the complaints, Osborne testified that on the weekend of June 6–7, 1981 (Saturday and Sunday), he worked both days. At that time he saw Estes on both such days and saw Estes following him around in a completely abnormal fashion: where Osborne would move from room to room, crossing the hall, entering different rooms with different patients, Estes would follow a consistently parallel path in adjoining rooms, crossing the hall at or about the same time that Osborne did. Although Osborne admits that Estes, on occasion, visited the facility on the weekends, Osborne, employed for 5 years by Respondent, said that Estes seldom then performed supervisory duties and regularly remained there only 10 or 15 minutes. Estes testified only that his mother and grandmother are residents and patients at the facility; that he is normally at the center on Monday through Friday but, since he lives only a mile away from the facility, he is usually there every day. He failed to deny any of Osborne's testimony regarding this repetitive, abnormal, weekend conduct. I conclude that this abnormal, unexplained Estes' conduct, coming so shortly after a showing of Estes' particularized resentment and disappointment at Osborne's union activities, demonstrated a *prima facie* case of Estes' surveillance of Osborne's union activities and that such *prima facie* case was in no substantial way rebutted by Respondent.

[3] To the extent that the General Counsel asserted that Harper was a biased witness by virtue of her testifying without subpoena and on her own time, I reject such assertion especially since she was herself a union card distributor, was no longer employed by Respondent at the time of her testimony, and owed Respondent nothing, at least on this record. There is no suggestion in the record of tampering. While it is true that in portraying Osborne's misconduct, which lead to his termination, see below, she tended to exaggerate both his shortcomings and her own, and other female employees' virtue, I nevertheless credit her basic testimony.

Rather, Estes' testimony supports and magnifies the irregularity of this behavior and fails to allege, much less prove, a business or other innocent explanation for it. I therefore conclude that, as alleged in paragraph 5(b)(ii), on or about June 6 and 7, 1981, at the facility, Estes kept Osborne under surveillance and the purpose of that surveilance was to intrude upon and checkup on Osborne's union activities. Such conduct violates Section 8(a)(1) of the Act as alleged and I so find.

To the extent that the complaint also alleges that there was unlawful surveillance by Respondent in "mid to late May" 1981, I find no further proof thereof and recommend to the Board that such allegations be dismissed.

Lastly, the complaint alleges (par. 5(d)) that since on or about July 3, 1981, Respondent promulgated, posted, and maintained a rule which unlawfully limits employees access to the facility and limits employee rights to solicit and distribute "materials" at the facility.

The evidence shows that Respondent's employee handbook (G.C. Exh. 3) contains the assertion that it is cause for progressive disciplinary action if an employee (rule (d)) enters "Woodview at times other than regular shift without permission of supervisor." None of the provisions of the rulebook relates to employee solicitation or distribution. The document shows that its last revision, signed by Frank Estes, administrator, was February 1980. On July 3, 1981, however, Estes issued a memorandum to the staff, the subject of which is "Rules on Solicitation and Distribution" (G.C. Exh. 2).[4]

1. To the extent that the introductory paragraph of the July 3, 1981, rules asserts that the rules had been in effect since the "opening of Woodview" and that they were "inadvertently" omitted from the employee handbook, the assertion is false since Estes testified, without further explanation, that this July 3, 1981, memorandum was issued in response to Respondent's employees engaging in union activities. It is clear, therefore, that prior to July 3, 1981, there was no employer rules limiting access, solicitation, and distribution by employees and that the July 3, 1981, memorandum limiting such activities was in response to and dedicated to limiting employees engaging in union activities. As alleged, the promulgation and dissemination of such rules, so motivated, limiting and proscribing solicitation and distribution, even if lawful on their face, render the rules invalid. *Ward Manufacturing, Inc.*, 152 NLRB 1270, 1271 (1965), and cases cited in fn. 2 therein; cf. *Tunica Manufacturing Company*, 236 NLRB 907, 913 (1978). Thus all the rules announced in the July 3, 1981, memorandum, even if facially lawful, are invalid because unlawfully promulgated.

2. Without regard to promulgation, Respondent's maintenance and enforcement of this rule which bans solicitation on employee "working time," and there appearing no further elaboration of *when* (during working hours or worktime) solicitation would be allowed, particularly in regard to breaktimes, lunchtime, and other periods not devoted to actual production or patient care, this new no-solicitation rule is *presumptively* unlawful. Moreover, in view of Respondent's failure to introduce evidence showing either that (1) the rule was clarified to the employees by dissemination of *when* the employees might solicit (no such evidence was introduced); or (2) that the restriction was required to ensure production, safety, or discipline (no such evidence was introduced), the presumptive invalidity has not been rebutted. *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981); *Eastex Inc.* v. *N.L.R.B.*, 437 U.S. 556, 573 fn. 22 (1978); *Beth-Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978). Thus, this rule banning solicitation on working time violates Section 8(a)(1) of the Act.

3. To the extent that the new "no-distribution" rule prohibits employees from distributing "written literature" of any kind in immediate patient care areas and "any other work area of the home," the new no-distribution rule would prohibit the distribution of union membership application cards ("written literature") in all work areas even during nonworktime. As the Supreme Court observed in *Beth Israel Hospital, supra* at fn. 10, the Board, in *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), established the distinction between *distribution* and *solicitation* and concluded that "distribution" of signature cards is solicitation and *not* distribution. Since Respondent's new "no-distribution" rule pertains to all written literature (i.e., a union membership application card) and prohibits its distribution in all work areas and also does not permit its distribution in work areas other than immediate patient care areas, or where patient care or health care would be disturbed (which is the permissible standard for *solicitation* of union membership application cards),[5] the

[4] The following is a reproduction of this memorandum to employees:

To: Staff
From: Frank Estes, Administrator
Subject: Rules on Solicitation and Distribution

The following rules have been in effect since the opening of Woodview. It has been recently brought to my attention that these rules have inadvertently been left out of our employee handbook; therefore, I am listing these rules for your information. They will be included in our revised employee handbook which you will be receiving in the near future.

EMPLOYEE NO-SOLICITATION RULE

Solicitation by an employee of another employee is prohibited, while either the person doing the soliciting or the one being solicited is on his/her working time. In addition, all solicitations shall be prohibited at all times in immediate patient care areas.

EMPLOYEE NO-DISTRIBUTION RULE

Employees are not permitted to distribute advertising material, handbills, printed or written literature of amy kind in immediate patient care areas and any other work areas of the home.

EMPLOYEE NO-ACCESS RULE

Employees are not permitted access to the interior of the Home or outside work aress during off-duty hours, unless they have received prior authorization from a Department Head or the Administrator.

NO-TRESPASS RULE

Solicitation, Distribution of Literature, or Trespassing by Non-Employees on These Premises is Prohibited.

Let me know if you have any questions concerning this memo.

Sincerely,

s/s Frank Estes
Frank Estes
Administrator

[5] Absent special circumstances, the Board rule, apparently supported by the Supreme Court, is that solicitation in health care institutions may not be proscribed in all work areas during nonworktime; and such a restriction is presumptively invalid in the absence of a showing of special

Continued

rule presumptively violated the Board's standard with regard to the "solicitation" of membership application cards in health care facilities and thus Section 8(a)(1) of the Act. Its presumptive invalidity has not been rebutted. Similarly, as the General Counsel observes (br., p. 6) the prohibition against general literature distribution in any other work area of the home without a showing that in such nonpatient care area patients might be disturbed is too broad. *N.L.R.B.* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979), *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976).

4. The new no-access rule, prohibiting employee access to both the interior of the home and *outside work areas* during off-duty hours without prior employer authorization, contrary to the General Counsel, is not inconsistent with *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976), since this rule (a) deals only with work areas; (b) was widely disseminated; and (c) applies generally and not merely to employees engaged in union activity. Moreover, there is no suggestion that Respondent was including parking lots and similar *nonwork* areas within this rule. I conclude, therefore, that the no-access rule is facially valid. That its promulgation was unlawfully motivated, as found, is another matter.

5. Lastly, Respondent has, on this record, long posted its property with no-trespass signs. In its new rule, however, it makes the no-trespass rule more specific: it prohibits solicitation, distribution, or trespassing by nonemployees. Such a rule seems to be consistent with Board policy with regard to nonemployee solicitation and distribution and is not unlawful. *Eastex Inc.* v. *N.L.R.B.*, 556 F.2d 1280 (5th Cir. 1978); *Babcock & Wilcox Co., supra.*

C. *Alleged Violation of Section 8(a)(3) With Regard to Kenneth Osborne*

A. The July 24, 1981, complaint alleges that on or about May 27, 1981, Respondent reduced Osborne's working hours for reasons proscribed by Section 8(a)(1) and (3) of the Act.

As a part-time employee (4 days per week rather than 5 days per week), Osborne's regular workdays for a long period of time antedating May 27, 1981, were Monday, Wednesday, Saturday, and Sunday of each week. He testified, and Respondent confirmed, that he made this arrangement because of his attending a nearby college and Respondent's desire to accommodate his schooltime hours with his worktime hours. Respondent's records confirm Osborne's testimony and, in the week commencing May 19, 1980, he worked Monday, Wednesday, Saturday, and Sunday (G.C. Exh. 4(f)).

It will be recalled, above, that on May 25, Administrator Estes, in essence, told Osborne that he was surprised and disappointed that Osborne would engage in union activities and on the same day told him: "You know that I did not have to give you days off or insurance benefits." These statements, I have concluded, were retaliatory, unlawful threats in violation of Section 8(a)(1). Two days later, on May 27, 1981, Estes called Osborne into his office and asked what days off were required for his schooling. Osborne said that it was Tuesday, Thursday, and Friday. Estes then observed that Osborne could therefore work only Monday, Wednesday, Saturday, and Sunday. Estes then looked at the work schedule and, according to Osborne, said: "I don't see how I can fit you in except for Saturday and Sunday and, at that, only every other Saturday and Sunday." When Osborne asked him why he was cutting back his hours, Estes allegedly said that there was too much summer help and not enough work around so that he had to give the summer help some of Osborne's work.

Neither Enright nor Estes deny that Enright and her nursing director predecessor (Agnes Homer) accommodated Respondent's scheduling of nurses aides in the north wing to Osborne's schooling requirements. They both, however, deny ever guaranteeing him that that accommodation would persist.

Enright testified without contradiction that when Osborne, in December 1980, requested working the day shift in the north wing, Enright promised to give him a day shift when such an opportunity presented itself. When that opportunity did present itself, in January 1981, Enright gave it to Osborne and Osborne commenced working that shift. Osborne, at that time, as in the past, had become a part-time employee working, as above noted, 4 days rather than 5 days per week. Enright further testified, without contradiction, that in order to effectuate her 6-week schedule, with 10 nurses aides on duty in the north wing on the day shift, Respondent required the equivalent of 15 full-time employees, each working 8-hour shifts. It is not disputed that this would result in five sets of three employees to get 2 of the 3 on a particular shift; and this works out to 10 employees (nurses aides) on a north wing day shift.

Enright testified, again without contradiction, that on May 23, 1981 (i.e., 2 days *before* Respondent's discovery of Osborne's union activities), she had 14 full-time and 4 part-time nurses aides working the north wing on the day shift. On that day, however, three of the four part-timers changed their working conditions: two of them resigned and one of them became a full-time employee. This left Respondent, on the uncontradicted evidence, with 15 full-time nurses aides and 1 part-time nurses aide (Kenneth Osborne). Respondent thus had a full complement of 15 full-time nurses aides for the north wing and therefore had the full scheduling ability without reference to the part-time Osborne. With this in mind, Enright, on May 23, made up the next 2-week schedule and reduced Osborne to only Saturday and Sunday work. She testified that, with the 15 full-time employees on the schedule, this guaranteed Respondent 10 full-time employees, and made Osborne superfluous. She further testified that Osborne was kept on the schedule for Saturday and Sunday only because of Respondent's scheduling experience in receiving a great many sudden employee requests for relief from weekend work. This problem required and permitted the use of a part-time employee

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circumstances (maintenance of employee safety, discipline, or production) or a showing that the solicitation would tend directly to affect patient care by disturbing patients or disrupting health services. *Beth Israel Hospital* v. *N.L.R.B., supra; Stoddard-Quirk Mfg. Co., supra; Central Solano County Hospital Foundation, Inc., d/b/a Intercommunity Hospital*, 255 NLRB 468 (1981).

to cover unanticipated employee requests for weekend leave. Enright was unwilling to keep Osborne, or any other part-time employee, on such a redundant basis during the week because there were few such requests for weekday periods. Enright, according to custom, sometime immediately after May 23, forwarded her proposed schedule to Estes for review and signature on late Tuesday afternoon, May 26, 1981,[6] Estes' contacted Enright, observed that there were no part-timers on the schedule during the week, and that Osborne was scheduled only for Saturday and Sunday. Enright told him that she had a full complement: two resignations of the part-timers and one part-timer becoming a full-time nurses aide.[7] Estes told her to call in Osborne to see if they could have him give Respondent any worktime other than only Saturday and Sunday.

Later on Wednesday, May 27, Enright spoke with Osborne in Estes' presence and showed him the new schedule with no other part-timer present on the schedule and tried to discover from him what days could be given to him without overstaffing. There is no dispute that Enright said that when she asked him what days he could work, he told them it was Monday, Wednesday, Saturday, and Sunday and that he could work no other days. Whereas Osborne testified that, when Estes spoke with him, he told Estes he needed Tuesday, Thursday, and Friday for school; Enright testified that Osborne said that he could only work Monday, Wednesday, Saturday, and Sunday, and when Enright asked him whether he had any other days he could work, Osborne not only answered in the negative but gave no reason. I do not regard this difference as material, although the agreed substance of the conversation, as noted below, is dispositive. In any event, Enright, without contradiction, said that Estes then told Osborne that Respondent was willing to have him work Saturdays and Sundays; that to have him work on Mondays and Wednesdays would be unacceptable overstaffing; and that he could work on Saturdays and Sundays because of the high percentage of full-time employees "call offs." When Enright then told Osborne that they would use him on Monday and Wednesday if they had "call offs" on those days, Enright said that Osborne merely said thank you in a good-natured manner. Later, Osborne was scheduled to work on certain Mondays and Wednesdays. On one occasion, on a Sunday, in June 1981, when Enright, in conformity with her prior statement to Osborne, asked him to work the next day, Osborne refused because he said that he was doing roofing work on that Monday.

Osborne admitted, when showed a copy of his college schedule for the spring and summer 1981, that his final examination period ended no later than the first week of May 1981.

[6] There is no dispute that Estes was not working on Monday, Memorial Day, May 25, 1981.

[7] These providential resignations were subject to no further inquiry.

D. *Discussion and Conclusions With Regard to the Alleged Unlawful Reduction in Osborne's Working Hours*

In view of my finding and conclusion that on or about May 25, 1981, Estes unlawfully threatened Osborne with a loss of health insurance advantages and advantageous working hours it is necessary to closely evaluate the facts concerning the May 27, 1981, schedule change. With the unlawful threats in mind, there are nevertheless several factors of record which stand out: (1) If Osborne is credited in this May 27, 1981, conversation, he misrepresented to Respondent the fact that he could work only Monday, Wednesday, Saturday, and Sunday because his school schedule required it. He admitted on cross-examination that he had no school after May 7, 1981, and this conversation with Respondent took place on May 27, 1981. It is unnecessary to resolve whether this misrepresentation resulted from Osborne's obstinacy, or purposeful falsehood, or, as he said, because he felt "intimidated" in the room with Estes and Enright. (2) The General Counsel never sought to prove, nor did the record ultimately demonstrate, that Respondent's explanation of Osborne's redundant position in the scheduling was either incorrect or pretextual. Thus Osborne was shown the new schedule and Enright explained the departure of the three part-time employees two of whom Respondent said resigned and one of whom became a full-time aide. In the face of that knowledge and in the face of Respondent's calling in Osborne and inquiring of him whether he would work other days, the General Counsel was unable or unwilling to show that Respondent's reliance on the May 23 change in its part-time employment situation, resulting in its use of 15 full-time nurses aides and the necessary redundancy of the extra part-timer (Osborne), was untrue or pretextual.[8] On May 27, 1981, for a period of weeks, Osborne no longer had schooling to prevent him from working other days; the Monday, Wednesday, Saturday, and Sunday schedule was irrelevent, and the burden obviously was on Osborne, by notifying Re-

[8] The General Counsel makes two arguments (br., pp. 9–10): (a) if Respondent were truly overstaffed, then it was false and misleading for Estes to ask what days other than Monday, Wednesday, Saturday, and Sunday Osborne was prepared to work; and (b) Respondent relied on Enright's oral testimony to prove the overstaffing rather than on records which the General Counsel had subpoened and Respondent had produced: G.C. Exh. 11, items 6 and 7; G.C. Exhs. 4(a)–(b).

With regard to (a), Osborne failed to suggest *any* availability except his existing schedule: Monday, Wednesday, Saturday, and Sunday. Thus, while Respondent's concern with Osborne's suddenly diminished work schedule is suspicious, Osborne never put Respondent to the test by stating his availability for other hours. The bona fides of the underlying alleged staffing changes was never contested by the General Counsel.

With regard to (b), the General Counsel cannot be heard to complain of crediting Enright's oral testimony. The General Counsel did not object to the receipt of such oral testimony on "best evidence" or other grounds. More important, the General Counsel had in his possession Enright's scheduling records (produced under his subpoena) from Respondent's records. Had Enright's oral testimony varied from such records (including the use of the erstwhile part-timer as full-time aide), it was the General Counsel's obligation to impeach her oral testimony with the records or otherwise. Contrary to the General Counsel, Respondent could rely on Enright's oral testimony in such circumstances, and it was the General Counsel's obligation to impeach. Once the records were in the General Counsel's possession pursuant to legal process, Respondent was not obliged to corroborate Enright by resort to such records.

spondent of his new, unfettered situation, to put Respondent in such a situation as to demonstrate its bad faith in the new schedule, consistent with the Estes' threat to Osborne only 2 days before. Thus, if Osborne had confronted Respondent with his new ability to work days other than those which he said that he was willing to work, and if Respondent then shifted its ground and said that even such other days were also unacceptable, then the argument for pretextual conduct in offering to employ Osborne on such alternative days might become apparent. Moreover, Estes' suggestion that some of the work had to be given to summer students would similarly be exposed. For reasons best known to Osborne, he persisted in telling Respondent that he could not work Tuesdays, Thursdays, or Fridays in spite of the fact he no longer had the school scheduling impediment preventing him from working those days. According to Osborne, the request for alternate days "never entered his mind." (3) If Respondent was intent on retaliation, Enright would not have offered Osborne the opportunity to work Monday in June. (4) Osborne was in a position to testify that Enright's explanation on the use of part-time and full-time aides was untrue and failed to do so.

In short, therefore, in spite of Estes threat, it appears that Respondent has offered a plausible explanation of its conduct, based on an objective, intermediate change of circumstances (i.e., the change in its part-time employees) which the General Counsel has failed to show to be untrue or pretextual. In addition, Osborne's clear failure to put Respondent to the test by offering alternate days on which Osborne obviously *could have worked*, added significantly to the General Counsel's burden of showing Respondent's conduct to be pretextual on otherwise tainted. I find that what actually occurred here, at least on the record before me, is that Respondent unlawfully threatened Osborne and then, for matters which do not appear on the record, thought better of the threat and called him in to offer alternate workdays. When Osborne refused any alternate workdays, Respondent continued Osborne working only on Saturdays and Sundays to prevent economic redundancy beyond its desires. I therefore recommend to the Board that the allegation relating to unlawful reduction of Osborne's working hours (par. 6(a)) be dismissed as unproven. Although the General Counsel may well have proved a *prima facie* case of unlawful reduction of hours, Respondent has met that burden by showing an objective, plausible, and reasonable (if rather fortuitous) explanation for the reduction, wholly unconnected with a discriminatory motive in the reduction, which, in turn, the General Counsel has failed to show to be untrue or pretextual. Thus, in applying the *Wright Line* equation,[9] Respondent met its evidentiary obligation to show that it reduced Osborne's hours for reasons wholly apart from the reason suggested in the General Counsel's *prima facie* case and, nevertheless, the General Counsel has failed to show this explanation to be untrue or pretextual and to bear the ultimate burden of proving the unfair labor practice. Under such circumstances, I must recommend to the Board that the allegation of unlawful diminution of Osborne's working hours be dismissed.

[9] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

E. *The Alleged Unlawful Termination of Kenneth Osborne on August 1, 1981*

Osborne admits that in June 1981 he received a *verbal warning* from Supervisor Donna Vedo because of his scraping of a patients leg on transferring the patient to a wheelchair. She admonished him to be more careful. It is undenied that Osborne, the single male nurses aide in the north wing, had greater strength than the female nurses aides and, on occasion, in handling patients, might not have been sufficiently gentle with the elderly patients as might be warranted.

Osborne also admits to receiving a *written* warning from Estes in mid-July 1981, for failing to surrender a $2 tip from the family of a patient, the acceptance of which is expressly forbidden by Respondent's rules (G.C. Exh. 3: *Employee Handbook*, rule 12(2), p. 17). Estes told Osborne that, if it happened again, it would be grounds for termination.[10] This occurred well after Respondent had identified Osborne as a union supporter and, indeed, after the unlawful threat, above, with regard to inclusion of Osborne in the insurance program and the accommodation of his working hours. Lastly, Osborne admits receiving a warning on July 26, 1981 (Resp. Exh. 6), which warning notice accused Osborne of (a) abusing and harassing patients; and (b) not doing his work.[11]

Nurses Aide Sandi Harper,[12] on the afternoon of July 26, 1981, was working in the north wing. It ordinarily not only takes two employees to shift a patient, but the work of all 10 north wing nurses aides on the day shift is required to keep the 20-odd patients properly cared for. Harper testified that at that time, late in the shift, she had a bad headache. She said, perhaps with some exaggeration, that she had observed during the entire 7-1/2-hour shift Osborne sitting at a desk in the hall and cleaning it out. She met Enright in the hall and, allegedly because of her headache and fatigue, together with observing Osborne doing no work, told Enright she had something to tell her. Enright invited her into the office. In the office, Harper complained that Osborne was doing nothing, not helping her, and had indeed created a great deal of trouble in caring for a fastidious patient (Mary Sonnerson). Osborne, over the patient's repeated and increasingly emotional objections, refused to leave the presence of the

[10] The General Counsel did not seek to show inconsistency of enforcement or other pretext in Estes' threat of discharge. Osborne's explanation for failing to turn over the tip, under the rules, was that he forgot about the money. The explanation was not convincing.

[11] Respondent furthermore offered into evidence, without the General Counsel's objection, three other verbal warnings which Respondent's supervisor, Donna Vedo, gave to Osborne: a March 4, 1981, verbal warning for not taking enough time with cleaning of patients; an April 22, 1981, warning admonishing greater care with handling the patients because of skin abrasions; and a July 21, 1981, warning resulting from complaints of coemployees, Shirley Penwell and Sandi Harper, because of Osborne's alleged too-rough handling of patients, and their rewashing of Osborne's patients (Resp. Exhs. 2, 3, and 4, in evidence). Thus some of the warnings antedated Osborne's union activity.

[12] Harper and the other nurses aides who testified for Respondent and against Osborne were, like Osborne, distributors of union literature and membership cards.

patient while the patient was on the toilet. When the patient became aggravated to the point of tears, nurses aide Penwell or Harper told Osborne to get out of the room and he did so. Harper added that Osborne's refusal to leave the presence of the patient was accompanied by his continued laughing, joking, and clowning. Finally, Harper complained of Osborne's consistent roughness in handling and bathing patients which hurt or frightened them. At that time, Harper said no more about Osborne's conduct or misconduct.

Although, in direct examination, he sought to deny or soften the incident with the patient (for instance, he said that Penwell told him that he had "better leave" whereas Enright, in reporting Harper's version to her, said that Harper finally told Osborne: "Get the hell out of here."), Osborne, on cross-examination, admitted the incident but denied being in a position to see if the patient was becoming more and more upset. On cross-examination, the General Counsel showed that Harper was exaggerating in her testimony with regard to Osborne's "throwing" patients into chairs; it was Harper's prior testimony that he merely "dropped them" into the chairs.

When Harper finished this July 26, 15- to 20-minute complaint to Enright, Enright left the room and sought out aides Shirley Penwell and Sandra Parks also working that shift with Osborne, in order to verify Harper's complaints with regard to the handling of the patient (Mary Sonnerson) and his failure to work. They then confirmed Harper's several complaints.

Whereas Enright testified that, after she dismissed Harper and Penwell, she recorded the incident in a memorandum at or about 3 p.m. and merely recalled the two female employees into the office to read and sign the statement, thereafter saying nothing to them, Harper testified that she signed the statement and Enright told her that she wanted her (Harper) to come back and tell Administrator Estes this story (as above noted, Estes does not work on Sunday) because she (Enright) "didn't know how to handle it." Enright denies having said this to Harper. Estes testified that he was not only not at work on Sunday but that Enright had tried to telephone him on Sunday but he was not at home. I credit Harper.[13]

At any rate, after Harper and Penwell signed the Enright memorandum, Enright called Osborne into the office and showed him not only the memorandum but a written reprimand she drafted to Osborne, dated July 26, 1981, which carried the statement that it was his "last and only" warning. She gave him a pink copy of this July 26 written warning and reprimand (Resp. Exh. 7). Osborne did not deny that Enright told him at that time that, previously, Supervisor Donna Vedo had given him a similar verbal warning because of his roughness with the patients. Enright testified that Osborne's answer was that he was not aware of his failure to work up to his ability and that his coworkers had said nothing about it. Osborne testified that he said that he had no idea of being rough on the patients, denied harassing patients, promised to do better in the future, and offered to Enright to have her observe his conduct. Insofar as Osborne testified that he had no idea that he handled patients roughly, I cannot credit his testimony. Further, I credit Enright's testimony that when she spoke to him about his failure to leave the presence of the female patient at toilet and the patient becoming aggravated on Osborne's refusal to leave, Osborne did not deny teasing and aggravating her. Osborne admitted that Enright told him that this was his first and only warning and that, if she heard of it again, it would be grounds for termination. Osborne then left.

On the next day, July 27, 1981 (Monday), Harper again visited the Enright office. As above noted, I credit Harper's testimony, contradicting Enright, that she came there at Enright's express request because Enright "didn't know how to handle" the situation and wanted Harper to tell these facts to Estes personally.[14] Although Enright denied the sequence and, I conclude, falsely asserted that Harper returned merely because Harper said that she had been "thinking about it all night" and wanted to fully explain her complaints against Osborne now that the matter was "opened up," there is no question that Harper returned and then proceeded to tell Enright of *other* Osborne misconduct of which Enright, on this record, was unaware: that Osborne had made repeated, objectionable sexual advances to Harper and Penwell and had made them uncomfortable in his refusing to cease his grabbing at their breasts and rear-ends and similar conduct. Although Osborne absolutely denied this conduct,[15] the corroboration of Harper's testimony by nurses aides Penwell, Moisan, and Brasfield (all of whom, with Osborne, had distributed union literature and membership cards) leaves little doubt that Osborne was untruthful in his denial that he made various types of indelicate and undesired sexual advances toward several of the nurses aides. Harper testified that she did not report these sexual advances prior to this time because she thought that Osborne would cease his conduct and

[13] Osborne had filed and served the charge in Case 25–CA–13615 on June 15, 1981, 6 weeks before this incident. Harper's and Penwell's complaints were serious matters. My observation of Enright, and of the record as a whole, lead me to conclude that she believed Osborne's conduct required Estes direct attention and that she did not desire to bear the full burden of Harper's complaints. Her hurried Sunday telephone calls to Estes, I infer, were for the purpose of notifying him of important news concerning Osborne and that Enright, indeed "didn't know how to handle it."

[14] Whether Enright was concerned solely because of Osborne's misconduct or merely wished to relay significant news concerning Osborne or saw an opportunity to "get the goods" on Osborne, to discipline him, and rid Respondent of a union troublemaker, on this record, is immaterial. Osborne's misconduct, at this point, was not trivial and there is clearly no evidence that Enright had any inkling of what Harper was about to disclose in this second session.

[15] Osborne admitted making lascivious remarks into the telephone while Harper was speaking to her husband but suggests that this was only playful. I agree it was playful on his part and a demonstration of fortitude and forbearance on Harper's. Harper testified that she elbowed him away from her when he grabbed her from behind and made these remarks into the phone, and told her husband, on the phone, that it was "only Kenny" and that Kenny (Osborne) was a "nut." I credit Harper that Osborne, behaving like the archetypical college freshman (age 22) engaged in this conduct on more than one occasion and that Harper regarded this without demonstrated rancor. I am not necessarily suggesting that Harper or any other female employee tolerated, much less candoned, Osborne's friskiness. More important, there is no suggestion on this record that Respondent was aware of these contretemps among its employees.

because she did not know really how to handle it. In short, I do not find that the evidence shows they believed Osborne was a serious sexual threat to them; rather, I find that he was an unwelcome nuisance that they did not make a formal complaint over until this occasion. Had they seriously objected they would have complained before this. On the other hand, as I saw Harper and the other nurses aides testify it is clear that in recounting the events to Enright they did not seek to minimize the seriousness of, and their objections to, Osborne's misconduct. Why they opened this subject is not shown. There is no evidence, however, that Enright ever solicited from them such further evidence of Osborne misconduct.

Enright then confronted Penwell who corroborated Harper's story. When Enright received further corroboration from aide Peggy Moisan, she directed Penwell and Harper to tell their tale to Estes whom she called into her office. By that time, the full story included Osborne jumping over beds, chasing Harper, and engaging in other adolescent gambols with Penwell and Harper. They also mentioned Osborne's trick of jumping out of closets and frightening the nurses aides and sometimes patients. This oafish juvenilia resulted in the nurses aides regularly hesitating to enter empty or dark rooms for fear that Osborne would jump out at them and, from time to time, make sexual advances.

Enright then memorialized this further statement by Harper, Penwell, and Moisan (Resp. Exh. 9) showed it to Estes and they discussed terminating Osborne. Enright recommended that Osborne be discharged for this sexual misconduct which was compounded by his mistreatment of the patient. Estes then checked with his attorney and, on August 1, called Osborne into the office. He told Osborne of complaints from female employees and noted his failure to work in the unit. Estes said that Osborne had violated the work rules with regard to violating his coemployees' rights (G.C. Exh. 3, rule j, p. 11) and told Osborne that his sexual harassment was grounds for termination.[16] Estes told Osborne that he had no choice other than to terminate him. Osborne then left.

It should be noted that Osborne, having denied that he had engaged in any sexual misconduct with the nurses aides, did not testify that, in any case, Respondent's supervisors knew of this conduct (or misconduct) or that sexual playfulness among employees was pandemic. Similarly, Osborne did not explain what he was doing all day on July 26 when Harper testified that he was merely cleaning his desk and not helping her.

Discussion and Conclusions

In light of Supervisor Donna Vedo's failure to testify with regard to the warning notices she gave him as early as April 1981 (which would show Respondent's displeasure before any union activity), for patient rough handling, I need not and do not rely on such verbal warning notices in reaching the conclusions below. While Enright may have alluded to prior verbal warnings from Supervisor Vedo because of Osborne's rough handling, the discharge of Osborne proceeded on two elements: the "last and only" reprimand of July 26 (because of his failure to do work and his misconduct with regard to the patient on her toilet); and the reports of Osborne's sexual misconduct coming from Harper, Penwell, and Moisan on the next day.

There is nothing in the evidence to suggest that Respondent encouraged the initial Harper-Penwell complaints of July 26, 1981, or knew of, or encouraged reports of, Osborne's sexual conduct prior to the reports of July 27. Whether or not Enright encouraged Harper to return the next day and tell her story to Estes, there is no suggestion that either Enright or Estes or any other supervisor encouraged or instigated Harper to make the original or further complaint. I have found, contrary to Enright's denial, that Enright directed Harper to come in the next day (Monday) and report the same complaint (Osborne's failure to work and abuse of Mary Sonnerson). I conclude that notwithstanding Osborne having been previously identified as a union activist and been threatened on that account prior to this event, Enright was clearly within her rights to further investigate alleged acts of Osborne misconduct concerning patient care and failure to work (Harper's original complaint) since I further conclude that these were not minor matters to be considered trivial in a nursing home. On this record, therefore, Enright was not building a pretext over trivial matters. This is so even where, as here, Enright insisted that Harper return the next day and repeat her allegations to Estes because Enright did not know "how to handle" this corroborated misconduct and Osborne had been an identified and, indeed, a threatened, union activist on whose behalf the unfair labor practice charge was filed and an investigation begun.[17]

I further find that when Harper came in the next day, July 27, Enright did not encourage her to expand on her discontent with Osborne's helpfulness but that Harper, on this record, expanded on her own into the area of Osborne's sexual misadventures with her and the other female nurses aides.

Thus, the Harper-Penwell reports of Osborne's misconduct made on July 26 or July 27 were not trival, and were not instigated by Respondent. I have credited Harper's assertion that Osborne did not do his work; did unnecessarily upset the patient by remaining in her presence against her expressed wish which aggravated the patient and caused the other nurses aides more difficulty; and did often engage in unwelcome sexual misconduct of a minor variety with the nurses aides. The fact that I find that his misconduct was of a "minor" variety, however, is the result of the nurses aides failing to object to his misconduct prior to this time. Such was not necessarily Respondent's perception of such conduct: Osborne's misconduct with the patients, his failure to work, and his sexual adventures, when viewed from Respondent's per-

[16] Osborne also signed a Respondent document (Resp. Exh. 10) in 1978 wherein he acknowledged, as part of "Patient Rights" in the facility, that patients are to be "free from mental or physical abuse."

[17] Although the complaint in Case 25-CA-13618 was mailed on July 24, 1981, Respondent did not receive it until July 27, 1981 (G.C. Exh. 1). It seems clear that Respondent received the complaint and notice of hearing on the reduction of Osborne's working hours before it discharged Osborne.

spective are not isolated or trivial acts surrounded by mere playfulness. Taken together, with the lack of proof that Respondent knew of Osborne's other sexual activities, and therefore might be said to have tolerated such conduct, there is no question that on this record Respondent could and did infer that Osborne was guilty of substantial misbehavior and violated the norms of permissible conduct and Respondent's work rules regarding both patients and coemployees. Even more so since Osborne had been previously warned about his roughness with patients.

While I am willing to find, and do find, that, by proof of knowledge, timing, and union animus, the General Counsel proved a *prima facie* case of an unlawful discharge of Osborne, there is little doubt on this record that Respondent has come forward to meet its *Wright Line* burden of showing that it discharged Osborne because of his misconduct in (1) failing to do his work and failing to help the other nurses aides, (2) unreasonably abusing and upsetting a patient, after prior warnings against rough conduct, and (3) engaging in sexual horseplay and misconduct with the female nurses aides. It is at this point that the General Counsel was obliged to prove that the acts of misconduct were either trivial or false or that Respondent's response was pretextual. The General Counsel failed to adduce any such proof. That Respondent may have welcomed the opportunity to discharge Osborne, a union advocate whom Respondent previously singled out for unlawful attention, does not make the subsequent discharge unlawful, *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966), where, as here, Osborne provided Respondent with sufficent cause.

Respondent, at bottom, may insist on its employees observing necessarily serious rules of decorum and not have them transform a medical facility catering to the aged and infirm into a romp and bagatelle.[18]

I therefore recommend that the Board dismiss the allegation of Osborne's unlawful discharge since the General Counsel failed to support its statutory burden of proof therefore by a preponderance of the credible evidence.

CONCLUSIONS OF LAW

1. By promulgating on July 3, 1981, and thereafter maintaining (G.C. Exh. 2) rules on solicitation and distribution, which rules were (1) promulgated for the unlawful purpose of restraining union activities among Respondent's employees and which rules (2) prohibit the distribution of written literature of "any kind," which would thus include union membership application cards, on working time outside of immediate patient care areas, and Respondent having failed to prove that such restrictions are necessary to ensure production, safety, or discipline, and failed to tell employees when, during the workday, they may engage in such or other protected activity, Respondent has both promulgated and maintained unlawfully broad rules in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

2. By threatening employees on and after May 25, 1981, that Respondent would thereafter not permit its employees to subscribe through Respondent to group health insurance at reduced rates or would not accommodate their working hours because they attend college classes, because any such employees are members of, support, or sympathize with any labor organization or because they engage in activities protected by Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act.

3. By threatening employees that if they selected the Union there would be a cut in benefits, failure to get prompt raises, and a futility in being represented by the Union, Respondent violated Secion 8(a)(1) of the Act.

4. By keeping the activities of Osborne under surveillance for the purpose of discovering whether he was engaging in union activities, on June 6–7, 1981, Respondent violated Section 8(a)(1) of the Act.

5. The unfair labor practices engaged in by Respondent affect commerce within the meaning of the Act.

6. The General Counsel has failed to prove by a preponderance of the evidence that Respondent has unlawfully reduced the working hours of, or unlawfully terminated the employment of, its employee Kenneth R. Osborne, within the meaning of Section 8(a)(1) and (3) of the Act.[19]

THE REMEDY

It having been found that Respondent made unlawful threats and promulgated and maintained unlawful rules regarding employee distribution and solicitation, shall recommend to the Board that Respondent be ordered to cease and desist from any such future conduct.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[20]

The Respondent, Woodview Rehabilitation Center, Michigan City, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of benefits because they are members of, or aid and assist or sympathize with, 1199 Indiana of the National Union of Hospital and Health Care Employees, a Division of Retail and Wholesale and Department Store Union, AFL–CIO, a labor organization herein called the Union, or of any other labor organization.

(b)(1) Promulgating, maintaining, or enforcing any rule, including rules limiting off-duty employees access to interior and exterior work areas, prohibiting employ-

[18] Paradoxically the evidence demonstrates that Osborne was a patient-oriented, sympathetic, and effective medical technician. Had the record shown any reasonable basis of inferring prior Respondent knowledge of Osborne's or similar activity, I would have entertained a far different view of his discharge.

[19] Except as expressly found herein, all other allegations of violation are dismissed as unproven.

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ees from soliciting or distributing union membership application cards or any other union literature during working time or in work areas, on behalf of the Union, where such promulgation was caused by its employees engaging in activities on behalf of the Union, or any other labor organization; or (2) promulgating, maintaining, or enforcing such a rule, regardless of Respondent's motive, which prohibits distribution by employees of union literature on working time in any facility work area without telling employees when they may engage in such and similar protected concerted activities outside of areas of immediate patient care.

(c) Keeping the activities of its employees under surveillance where the object is to interfere with their lawful union or protected concerted activities.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post in conspicuous places at its nursing home in Michigan City, Indiana, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[21] Copies of said notice provided by the Regional Director for Region 25, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint, insofar as it alleges violations of the Act other than those found above, is hereby dismissed.

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[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."